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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 151

[Docket ID: DOD-2012-OS-0069]

RIN 0790-AI89

Foreign Criminal and Civil Jurisdiction

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This rule updates procedures concerning trial by foreign criminal courts of, treatment in foreign prisons of, and the payment of counsel fees in certain civil cases for individuals referred to collectively in this rule as “dependents of DoD personnel.” Dependents of DoD personnel serving under a U.S. Chief of Mission are not considered to be “dependents of DoD personnel” for the purposes of this rule.

DATES: This final rule is effective [INSERT 30 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Bart Wager, 703-571-9355.

SUPPLEMENTARY INFORMATION:

Public Comments

On Friday, October 19, 2018 (83 FR 53020-53023), the Department of Defense published a proposed rule titled “Foreign Criminal and Civil Jurisdiction” for a 60-day public comment period. Seven commenters provided responses addressing issues that fell within the scope of the

rule. These comments are available through the eRulemaking docket, available on-line at www.regulations.gov, and then navigating to this rulemaking docket, DOD-2012-OS-0069. Although no changes were made to the final rule based on public comment, the Department summarizes the comments and its responses as follows.

Three commenters noted the rule's importance and indicated general support for the rule's protections for dependents of DoD personnel. Two commenters noted implementation would be influenced by the relationship the United States has with the country where DoD personnel are located, and therefore the Department lacked the authority to implement fully the protections described in the rule. DoD acknowledges concerns about the need to rely on the discretion of, and relationship with, foreign countries. The Department believes these issues are addressed by requiring DoD personnel responsible for implementing the rule to work closely with in-country State Department officials. Two commenters expressed concern the rule did not eliminate the possibility of capital punishment in a foreign country for a dependent. DoD acknowledges the concern. However, the United States does not have the authority to eliminate the possibility of a foreign court imposing capital punishment on those affected by the rule.

Authorities

Taken together, two statutes authorize the Secretary of Defense to issue legally binding guidelines on the Department of Defense. Under 10 U.S.C. 113, the Secretary has "authority, direction, and control" over the Department of Defense. The Department of Defense is an "executive department," and the Secretary, as the head of an "executive department," is empowered under 5 U.S.C. 301 to issue departmental regulations. The General Counsel of the Department of Defense has been delegated authority under Department of Defense Directive 5145.01, "General Counsel of the Department of Defense" (available at

<http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/514501p.pdf>), to issue this policy. Title 10 U.S.C. 1037 authorizes the payment of counsel and other fees in certain cases in foreign judicial tribunals and administrative agencies.

Revisions by This Rule

This rule amends 32 CFR part 151, “Status of Forces Policies and Information,” which was last updated on March 28, 1980 (45 FR 20465). In 1985, Section 681 of Public Law 99-145 amended 10 U.S.C. 1037 to authorize the payment of counsel fees for those “not subject to the Uniform Code of Military Justice.” This final rule updates procedures concerning trial by foreign criminal courts of, treatment in foreign prisons of, and the payment of counsel fees in certain civil cases for command-sponsored and non-command sponsored dependents of Armed Forces members, and dependents of nationals and non-nationals of the United States who are serving with or accompanying the Military Services.

Summary of the Major Provisions

For dependents of DoD personnel, when those dependents are in a foreign country as a result of accompanying DoD personnel who are assigned duty in that country, it is Department of Defense policy to: (a) maximize the exercise of U.S. jurisdiction to the extent permissible under applicable status of forces agreements or other forms of jurisdiction arrangements; (b) protect, to the maximum extent possible, the rights of dependents of DoD personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons; and (c) secure, where possible, the release of an accused to the custody of U.S. authorities pending completion of all foreign judicial proceedings.

A “designated commanding officer” in each geographical area assigned to a Combatant Command is to: (1) cooperate with the appropriate U.S. Chief of Mission and to the maximum

extent possible, ensure that dependents of DoD personnel receive the same treatment, rights, and support as would be extended to U.S. Armed Forces members in comparable situations; (2) report informally and immediately to the General Counsel of the Department of Defense, the applicable geographic Combatant Commander, and the General Counsel and the Judge Advocate General of the respective Military Department, or, in the case of the Marine Corps, to the General Counsel of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, or, in the case of the Coast Guard, the Judge Advocate General of the Coast Guard, about important new cases or important developments in pending cases related to such dependents; and (3) take additional steps that may be authorized under relevant international agreement(s) with the receiving State to implement the policy of this part.

Expected Impact of the Final Rule

The revisions are expected to cause no change to the burden or cost to dependents of DoD personnel. DoD is not changing the process for dependents to access these services and therefore does not anticipate a change in the population of eligible DoD dependents for these services. The Department will continue to provide relevant free legal services to the dependents of DoD personnel and acceptance of these legal services is entirely voluntary.

Regulatory Procedures

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the

importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule is not a “significant regulatory action,” and was not reviewed by the Office of Management and Budget (OMB).

Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”

This final rule is not subject to the requirements of Executive Order 13771 (82 FR 9339, February 3, 2017) because this final rule is not significant under Executive Order 12886.

Section 202, Public Law 104-4, “Unfunded Mandates Reform Act” (2 U.S.C. Chapter 25)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. This final rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

The Department of Defense certifies that this final rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 151 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct

requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule will not have a substantial effect on State and local governments.

List of Subjects in 32 CFR Part 151

Courts, Foreign relations, Military personnel, Prisons.

Accordingly, 32 CFR part 151 is revised to read as follows:

PART 151—FOREIGN CRIMINAL AND CIVIL JURISDICTION

Sec.

151.1 Purpose.
151.2 Applicability.
151.3 Definitions.
151.4 Policy.
151.5 Responsibilities.
151.6 Procedures.

Authority: 10 U.S.C. chapter 47, 10 U.S.C. 1037.

§ 151.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures, supplemental to those provided in DoD Instruction 5525.01, “Foreign Criminal and Civil Jurisdiction,” which will be made available at <http://www.esd.whs.mil/Directives/issuances/dodi/>, concerning trial by foreign criminal courts of, treatment in foreign prisons of, and the payment of counsel fees in certain civil cases for the following individuals, referred to collectively in this part as “dependents of DoD personnel,” when those individuals are in a foreign country as a result of accompanying DoD personnel who are assigned duty in that country:

(a) Command-sponsored and non-command sponsored dependents of Armed Forces members;

(b) Dependents of nationals and non-nationals of the United States who are serving with or accompanying the Military Services (referred to in this rule as “non-military DoD personnel”) in an area outside the United States and its territories and possessions, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico (referred to collectively in this rule as “outside the United States”);

(c) Dependents of DoD personnel serving under a U.S. Chief of Mission are not considered to be “dependents of DoD personnel” for the purposes of this part.

§ 151.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

§151.3 Definitions.

These terms and their definitions are for the purposes of this part.

Armed Forces. As set forth in 10 U.S.C. 101(a)(4), the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Designated commanding officer (DCO). The military officer who is designated by the appropriate geographic Combatant Commander to fulfill the duties outlined in this part.

DoD personnel. Armed Forces members and non-military DoD personnel. Armed Forces members and non-military DoD personnel serving under a U.S. Chief of Mission are not considered to be “DoD personnel” as defined in this part.

Non-military DoD personnel. Nationals and non-nationals of the United States who are serving with or accompanying the Armed Forces in an area outside the United States and its territories and possessions, the northern Mariana Islands, and the Commonwealth of Puerto Rico.

§ 151.4 Policy.

(a) The Department of Defense will, for dependents of DoD personnel when those dependents are in a foreign country accompanying DoD personnel who are assigned duty to that foreign country:

(1) Maximize the exercise of U.S. jurisdiction to the extent permissible under applicable status of forces agreements or other forms of jurisdiction arrangements.

(2) Protect, to the maximum extent possible, the rights of dependents of DoD personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.

(3) Secure, where possible, the release of an accused to the custody of U.S. authorities pending completion of all foreign judicial proceedings.

(b) [Reserved]

§ 151.5 Responsibilities.

(a) The Secretaries of the Military Departments ensure the adequacy of regulations in establishing an information and education policy on the laws and customs of the host country for dependents of DoD personnel assigned to foreign areas.

(b) For each country in their respective assigned area of responsibility (AOR), the geographic Combatant Commanders:

(1) Oversee Command implementation of the procedures in this part.

(2) Oversee DCO responsibilities, as described in paragraphs (c)(1) through (4) of this section.

(c) DCO responsibilities. The DCOs:

(1) Are responsible for formal invocation, where applicable, of the Senate resolution procedure in each foreign country where dependents of DoD personnel are present, consistent with the U.S. Senate Resolution of Ratification, with reservations, to the North Atlantic Treaty Organization Status of Forces Agreement, as agreed to by the Senate on July 15, 1953.

(2) In cooperation with the appropriate U.S. Chief of Mission and to the maximum extent possible, ensure dependents of DoD personnel receive the same treatment, rights, and support as Armed Forces members when in the custody of foreign authorities, or when confined (pre-trial and post-trial) in foreign penal institutions. DCOs will work with the appropriate U.S. Chief of Mission to make appropriate diplomatic contacts for dependents of DoD personnel who are not U.S. nationals.

(3) Report informally and immediately to the General Counsel of the Department of Defense, the applicable geographic Combatant Commander, and the General Counsel and the Judge Advocate General of the respective Military Department or, in the case of the U.S. Marine Corps (USMC), to the General Counsel of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, or, in the case of the Coast Guard, the Judge Advocate General of the Coast Guard, about important new cases or important developments in pending cases. Important cases include, but are not limited to, instances of denial of the procedural safeguards under any applicable agreement; deficiency in the treatment or conditions of confinement in foreign penal institutions; or arbitrary denial of permission to visit dependents of DoD personnel.

(4) Take additional steps that may be authorized under relevant international agreements with the receiving State to implement the policy of this part.

§ 151.6 Procedures.

(a) Request to foreign authorities not to exercise their criminal and civil jurisdiction over dependents. The procedures in this section will be followed when it appears that foreign authorities may exercise criminal jurisdiction over dependents of DoD personnel:

(1) When the DCO determines, after a careful consideration of all the circumstances, including consultation with the Department of Justice where the matter involves possible prosecution in U.S. civilian courts, that suitable action can be taken under existing U.S. laws or administrative regulations, the DCO may request the local foreign authorities to waive the exercise of criminal jurisdiction.

(2) When it appears possible that the accused may not obtain a fair trial, the commander exercising general court-martial jurisdiction over the command to which such persons are attached or with which they are associated will communicate directly with the DCO, reporting the full facts of the case. The DCO will then determine, in the light of legal procedures in effect in that country, if there is a risk that the accused will not receive a fair trial. If the DCO determines that there is a risk that the accused will not receive a fair trial, the DCO will decide, after consultation with the U.S. Chief of Mission, whether a request should be submitted through diplomatic channels to foreign authorities seeking their assurances of a fair trial for the accused or, in appropriate circumstances, that they waive the exercise of jurisdiction over the accused. If the DCO so decides, a recommendation will be submitted through the geographic Combatant Commander and the Chairman of the Joint Chiefs of Staff to the Secretary of Defense. Copies must be provided to the Secretary concerned and the GC DoD.

(b) Trial observers and trial observers' reports. (1) U.S. observers at trials before courts of the receiving country (referred to in this section as "trial observers") must attend and prepare

formal reports in all cases of trials by foreign courts or tribunals of dependents of DoD personnel, except for minor offenses. In cases of minor offenses, the observer will attend the trial at the discretion of the DCO, but will not be required to make a formal report.

(i) Unless directed by the DCO, trial observers are not required to attend all preliminary proceedings, such as scheduling hearings, but will attend the trial on the merits and other pre- and post-trial proceedings where significant procedural or substantive matters are decided.

(ii) Trial observer reports regarding dependents of DoD personnel will be handled and processed pursuant to DoD Instruction 5525.01(4)(b–c).

(2) The DCO, upon receipt of a trial observer report, will be responsible for determining whether:

(i) There was any failure to comply with the procedural safeguards secured by the pertinent status of forces agreement.

(ii) The accused received a fair trial under all the circumstances. Due regard should be given to those fair trial rights listed in DoD Instruction 5525.01 “Foreign Criminal and Civil Jurisdiction,” Enclosure 5, “Fair Trial Guarantees” that are relevant to the particular facts and circumstances of the trial. A trial will not be determined to be unfair merely because it is not conducted in a manner identical to trials held in the United States.

(A) If the DCO believes that the procedural safeguards specified in pertinent agreements were denied or that the trial was otherwise unjust, the DCO will submit a recommendation as to appropriate action to rectify the trial deficiencies and otherwise to protect the rights or interests of the accused. This recommendation must include a statement of efforts taken or to be taken at the local level to protect the rights of the accused.

(B) The DCO will submit the recommendation to the Secretary of Defense, through the

Under Secretary of Defense for Policy (with an advance copy to the General Counsel of the Department of Defense); copies must be provided to the geographic Combatant Commander concerned, the General Counsel and the Judge Advocate General of the Military Department concerned or, in the case of the USMC, to the General Counsel of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, or, in the case of the Coast Guard, the Judge Advocate General of the Coast Guard, and the Chairman of the Joint Chiefs of Staff.

(c) Counsel fees and related assistance for U.S. personnel not subject to the UCMJ. In cases of exceptional interest to the Military Department concerned or the Department of Homeland Security involving non-military DoD personnel, the Secretary of that Military Department or the Secretary of Homeland Security may approve, pursuant to 10 U.S.C. 1037, under the following circumstances:

(1) Criminal cases. Requests for the provision of counsel fees and payment of expenses in criminal cases may be approved in pre-trial, trial, appellate, and post-trial proceedings in any criminal case where:

(i) The sentence that is normally imposed includes confinement, whether or not such sentence is suspended;

(ii) Capital punishment might be imposed;

(iii) An appeal is made from any proceeding in which there appears to have been a denial of the substantial rights of the accused;

(iv) The case, although not within the criteria established in paragraphs (c)(1)(i) through (iii) of this section, is considered to have significant impact on U.S. interests, including upon the relations of the Armed Forces with the host country.

(2) Civil cases. Requests for provision of counsel fees and payment of expenses in civil

cases may be granted in trial and appellate proceedings in civil cases where the case is considered to have a significant impact on the relations of the Armed Forces with the host country; or in cases brought against eligible non-military DoD personnel (and in exceptional cases, by such personnel) if the case is considered to involve any other U.S. interest.

(3) Funding restrictions. (i) No funds will be provided under this part in cases where the U.S. Government is -- in actuality or in legal effect -- the plaintiff or the defendant; all such cases shall be referred to the Department of Justice, Office of Foreign Litigation. No funds will be provided under this part in cases where the non-military DoD personnel member is a plaintiff without prior authorization of the Secretary of the Military Department concerned or the Secretary of Homeland Security. The provisions of this paragraph also are applicable to proceedings with civil aspects that are brought by eligible personnel as criminal cases in accordance with local law. Funds for the posting of bail or bond to secure the release of non-military DoD personnel from confinement will be used as provided by applicable Armed Force regulations.

(ii) No funds will be provided under paragraph (c)(2) of this section to a plaintiff who, if successful, will receive an award, in whole or in part, from the United States.

(iii) As provided for in 10 U.S.C. 1037, a person on whose behalf a payment is made under this provision is not liable to reimburse the United States for that payment, unless he or she is responsible for the forfeiture of bail provided for him or her under this provision.

(d) Treatment of dependents confined in foreign penal institutions. In cooperation with the appropriate U.S. Chief of Mission and to the maximum extent possible, military commanders will ensure that dependents of DoD personnel receive the same treatment, rights, and support as would be extended to Armed Forces members when in the custody of foreign authorities, or

when confined (pretrial and post-trial) in foreign penal institutions. Commanders will work with the appropriate U.S. Chief of Mission to make appropriate diplomatic contacts for the categories of dependents described in this section who are not U.S. nationals.

(e) Information policy. The general public and the Congress must be provided promptly with the maximum information concerning status of forces matters that are consistent with the national interest. Information will be coordinated and provided to the public and the Congress in accordance with established procedures, including those in DoD Directive 5122.05, “Assistant to the Secretary of Defense for Public Affairs (ATSD(PA))” (available at http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/512205_dodd_2017.pdf?ver=2017-08-07-125832-023), 32 CFR part 286, 32 CFR part 310, and DoD Instruction 5400.04, “Provision of Information to Congress” (available at <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/540004p.pdf>).

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Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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